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NOS. 04-1528, 04-1530 & 04-1697

In the
SUPREME COURT OF THE UNITED STATES

NEIL RANDALL, *ET AL.*,
AND
VERMONT REPUBLICAN STATE COMMITTEE, *ET AL.*,
Petitioners / Cross-Petition Respondents,

v.

WILLIAM H. SORRELL, *ET AL.*,
Respondents / Cross-Petitioners,
AND
VERMONT PUBLIC INTEREST RESEARCH GROUP, *ET AL.*,
Respondent-Intervenors / Cross-Petitioners.

On Writ Of *Certiorari* To The
United States Court Of Appeals
For The Second Circuit

Brief Of Respondents/Cross-Petitioners William H. Sorrell, *Et Al.*

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QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

2. Whether the dollar amounts of Vermont's limits on campaign contributions to candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

3. Whether Vermont's rebuttable presumption of coordination, which provides that an expenditure made by a political party that primarily benefits six or fewer candidates is presumed to be a coordinated expenditure subject to contribution limits, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch, and Libertarian Party of Vermont: *Petitioners in 04-1528 and Cross-Petition Respondents in No. 04-1697*;

Vermont Republican State Committee; Vermont Right to Life Committee, Inc., Political Committee, Vermont Right to Life Committee–Fund for Independent Political Expenditures; Marcella Landell; and Donald R. Brunelle: *Petitioners in No. 04-1530 and Cross-Petition Respondents in No. 04-1697*;

William H. Sorrell; John T. Quinn; William Wright; Robert Butterfield; Robert Simpson, Jr.; Vincent Illuzzi; James Hughes; David Miller; Joel W. Page; William Porter; Keith W. Flynn; James P. Mongeon; Craig Nolan; Dan Davis; Robert L. Sand; and Deborah Markowitz: *Respondents in Nos. 04-1528 & 04-1530 and Cross-Petitioners in No. 04-1697*;[1]

Vermont Public Interest Research Group, Inc.; League of Women Voters of Vermont; Rural Vermont; Vermont Older Women's League; Vermont Alliance of Conservation Voters; Mike Fiorillo; Marion Grey (deceased); Phil Hoff; Frank Huard; Karen Kitzmiller (deceased); Daryl Pillsbury; Marion Milne; Elizabeth Ready; Nancy Rice; Cheryl Rivers; and Maria Thompson: *Respondent-Intervenors in Nos. 04-1528 & 04-1530 and Cross-Petitioners in No. 04-1697.*

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[1] As this is an official capacity action, pursuant to Supreme Court Rule 35.3, State's Attorneys Dale Gray, Lauren Bowerman, George Rice, James McNight and Terry Trono have been replaced by Robert Butterfield; Robert Simpson, Jr.; David Miller; William Porter; and Craig Nolan who are, respectively, the current officeholders.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

JURISDICTION OVER CROSS-PETITION 1

STATEMENT OF THE CASE 1

I. Act 64 1

II. Proceedings Below 5

SUMMARY OF THE ARGUMENT 13

ARGUMENT 15

I. Act 64's Spending Limits Are Constitutional 15

A. States Have Unique Duties To Protect Their Electoral Systems And Maintain Citizen Faith In Government 16

B. Vermont's Spending Limits Deter Real and Apparent Corruption 17

C. Vermont's Spending Limits Protect The Time Of Officials And Candidates 22

D. Vermont's Spending Limits Do Not Favor Incumbents 25

E. Vermont's Spending Limits Are Narrowly Tailored 26

II. Alternative Constitutional Analyses Support Vermont's Spending Limits 28

III. Vermont's Limits On Political Contributions Are Constitutional 31

A. Vermont's Contribution Limits Deter Actual And Perceived Corruption 31

B. Vermont's Contribution Limits Are Closely Drawn 37

IV. Vermont's Party Contribution Limits Are Constitutional 43

V. The Rebuttable Presumption Of Section 2809(d) Is Constitutional 47

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 28

Burson v. Freeman, 504 U.S. 191 (1992) 16,28,29

Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*) ..... *passim*

California Democratic Party v. Jones, 530 U.S. 567 (2000) 20

Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) 22,30,49

CSC v. Letter Carriers, 413 U.S. 548 (1973) 17,21,29

Daggett v. Commission on Governmental Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2000) 40,42

Denver Area Educ. Telecom. Consortium v. FCC, 518 U.S. 727 (1996) 27

Elrod v. Burns, 427 U.S. 347 (1976) 29

FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982) 22,32,33,42

FEC v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431 (2001) 20,21,43,44,46,47

First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 16,17

Florida Right to Life, Inc. v. Mortham,
No. 6:98-770, 2000 WL 33733256
(M.D. Fla. Mar. 20, 2000) 42

Gentile v. State Bar of Nevada, 501 U.S.
1030 (1991)..... 28

Gregory v. Ashcroft, 501 U.S. 452 (1991) 16,17

Harte-Hanks Communications, Inc. v.
Connaughton, 491 U.S. 657 (1989)..... 40

Largess v. SJC, 373 F.3d 219
(1st Cir. 2004)..... 29

McConnell v. FEC, 540 U.S. 93 (2003) .....*passim*

Montana Right to Life Ass'n v. Eddleman,
343 F.3d 1085 (9th Cir. 2003) 42

Munro v. Socialist Workers Party, 479
U.S. 189 (1986) 33

Nixon v. Shrink Missouri Government PAC,
528 U.S. 377 (2000) .....*passim*

Oregon v. Mitchell, 400 U.S. 112 (1970)..... 16

Republican Party v. White, 536 U.S. 765
(2002)..... 28

Riley v. National Fed'n of the Blind,
487 U.S. 781 (1988) 49

Rocque v. Cooperative Fire Ins. Ass'n,
438 A.2d 383 (Vt. 1981)..... 48,49

Romer v. Evans, 517 U.S. 620 (1996) 30

Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996) 22

Shrink Missouri Gov't PAC v. Adams, 204 F.3d 838 (8th Cir. 2000) 42

State v. Giard, 871 A.2d 976 (Vt. 2005) 48,49

State v. Pluta, 600 A.2d 291 (Vt. 1991) 48

Storer v. Brown, 415 U.S. 724 (1974) 17

United States v. Dennis, 183 F.2d 201 (2nd Cir. 1950), *aff'd*, 341 U.S. 494 (1951) 30

United States v. Lopez, 514 U.S. 549 (1995) 31

United States v. O'Brien, 391 U.S. 367 (1968) 38

Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993) 22

Whalen v. Roe, 429 U.S. 589 (1977) 30

Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) 16

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 2 17,29

U.S. Const. art. I, § 4 17

U.S. Const. art. IV, § 4 17,29

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. X 17

Vt. Const. ch. I, art. 6 23

Vt. Const. ch. I, art. 7 23

Vt. Const. ch. I, art. 8 2,17

Vt. Const. ch. II, § 8 17

STATUTES AND RULES

2 V.S.A. §266 27

17 V.S.A. §2801(3) 26

17 V.S.A. §2805 5,26,45

17 V.S.A. §2805a 5,26

17 V.S.A. §2809 12,15,27,47,48,49,50

Fed. R. Evid. 201 16

Vt. R. Evid. 301 48,49

House and Senate Rules, Part III, Rule 10, *at* http://www.leg.state.vt.us/misc/rules2.htm 27

Secretary of State Regulation 2000-01 48

LAW REVIEWS AND MISCELLANEOUS CITATIONS

Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994) 25

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Vermont Elections Data, *at http://Vermont-elections.org/elections1/1974to2004 RegPop.html* 16

JURISDICTION OVER CROSS-PETITION

The Petition for a Writ of *Certiorari* in No. 04-1528 was placed on this Court's docket on May 16, 2005. Pursuant to Rule 12.5, the Conditional Cross-Petition of William H. Sorrell, *et al.* (the "State") and Vermont Public Interest Research Group, Inc. ("VPIRG"), *et al.*, No. 04-1697, was timely filed by transmitting it to the Clerk of the Court on June 14, 2005. Jurisdiction lies under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. Act 64

A. The Vermont Legislature passed Act 64 in 1997 after an extraordinary series of hearings on the influence of money in politics. The 65 hearings, at which 145 witnesses testified, unequivocally demonstrated that, despite existing contribution limits and disclosure laws, Vermonters' faith in the integrity of government and in their elected officials was being profoundly shaken by the effects of large contributions and unfettered campaign spending. Randall Petitioners' Appendix ("P.A.") 31a-32a.

The Legislature made detailed Findings that set forth Act 64's purposes and the conclusions that body drew from the record before it. The Findings specify how large campaign contributions and unrestrained campaign expenditures reduce public confidence in government, pressure officials to give access and respond to large contributors in preference to those who can afford to give little or nothing, increase the appearance that officials are unduly influenced by monied interests at the expense of the best interests of Vermont citizens, marginalize regular citizens from the political process, force officials to divert their time and energies from their duties to limitless fundraising, decrease robust debate of issues and candidate interaction with the public, and financially prevent many Vermonters from seeking public office. Joint Appendix ("J.A.") 20-23.

The Legislature concluded that a carefully drawn law containing both expenditure limits and contribution limits would work directly to remedy all of the above ills; would restore integrity to the electoral process; would permit healthy, vibrant and effective campaigns; and would ensure the Vermont Constitution's directive that "'all elections ought to be free and without corruption.'" P.A. 35a (quoting Vt. Const. ch. I, art. 8).

B. Significant testimonial and documentary evidence gave full support to the Findings. Even with Vermont's prior contribution limits, the record showed how the need for unlimited cash allowed contributors and groups of contributors to obtain preferential access and exert undue influence over officials. Governor Howard Dean confessed that: "money does buy access, and we're kidding ourselves and Vermonters if we deny it." P.A. 93a-94a; *see* Exs.[2] I:92; II:732 (access and attention are commodities). The President of the Senate, Peter Shumlin, admitted that his decisions are sometimes made "based upon that whole lot of money I raised." Ex. I:291; *see* Exs. I:205 (money "plays a role in decisions"); III:795-97 (former Treasurer bowed out of re-election race after awarding no-bid contracts to firms that had contributed to his campaign); II:425-26 (influence of monied interests helped defeat bottle bill); I:217 (contributions given to obtain influence); II:503 (same); II:492 ("money buys influence"); I:349 (officials "more accountable" to contributors); II:428 (money controls candidates); I:369-70 (concern over "purchase of influence"); I:217 (unsolicited corporate donations were made to influence); I:405-06 (lobbyists can influence officials' decisions based on past giving and future need).

The Legislature heard that parties and candidates, too, exploit such a system by seeking funds from those who regularly come before them. Exs. II:511 (aggressive targeting

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[2] Ex. __ and Tr. __ refer to the pages of the binders of trial exhibits and transcripts that comprised the record in the court of appeals.

of lobbyists for contributions); II:505 (lobbying and contributing "inextricably...linked"); I:299-300 ("close" connection between contributions and support of positions); I:203 (similar).

The Legislature was further aware that such dubious practices, and numerous others, had been reported to the people of Vermont through the media, thereby fueling the public perception that officials are unduly influenced by large contributions and the overwhelming need for campaign cash.[3]

The State's regime of large contributions and unrestricted spending, lawmakers learned, had left many Vermonters on the outside looking in. A third-generation farmer, for example, testified that small family farmers typically cannot afford to contribute money to political candidates, and thus cannot obtain the influence held by many corporations. Ex. I:374-75, 92 ("average Vermonter can't afford the price of admission" to political system).

In addition, Legislators studied campaign finance abuses that had occurred outside Vermont and sought to guard against them. Exs. V:1737 (Vermont "is at risk of slipping into the same special interest swamp that has become our nation's capital"); V:1735-36 (Republican Party concerned over national scandals reaching Vermont); III:811-26 (press accounts of national campaign scandals); *see also* Exs. I:272, 291-92, 383; II:483-84, 732 (Legislators feared spread of corruption).

The legislative record also showed that the pursuit of campaign monies had become very time consuming.

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[3] Exs. III:747 (concern that tobacco donations caused weakening of anti-smoking bill and that union donations had ensured passage of pro-worker law); III:789 (pressure to secure contributions blocked health care reform); III:785, 787 (contributions made by slate companies to Legislators considering quarry bill); III:805-07, 809-10 (donations by Tobacco Institute followed defeat of tobacco bill); III:747, 763, 777 (public attitudes toward large donations); *see also* Trs. IX:180-84; X:6-9.

Fundraising had diverted officeholders from their official duties, had lessened the amount of time that could be spent with the public, and had limited the scope of the views considered by officials and candidates. Exs. I:204, 209, 353; II:603; J.A. 21 (Finding (a)(11)).

Numerous witnesses additionally testified that Act 64 was necessary to loosen the grip that incumbents had on elections in Vermont. Exs. I:231, 376-77; II:525, 648-49. By limiting incumbents' ability to amass large campaign war chests and greatly outspend opponents, witnesses forecasted that Act 64 would increase meaningful electoral competition. Exs. I:92, 395-96, 371-72, 376-79; II:484, 730.

Based on its own experience and the record before it, the Legislature determined that Vermont's voluntary spending caps, which few had accepted,[4] coupled with contribution limits, had been and would continue to be inadequate to deter political corruption and its appearance, to ensure that officials could devote sufficient time to their duties, and to restore public confidence in government. While contribution limits play a vital role in deterring individual corruption, so long as candidates require ever-increasing pools of campaign cash, they would still be beholden to large, monied interests and distracted from their duties. As a result, the Legislature concluded that limits on candidate expenditures as well as on contributions were necessary to respond comprehensively to the problem.

In setting the appropriate levels for those limits, the Legislature painstakingly considered factors unique to Vermont such as population, media costs, historical information on past spending and contributing in campaigns, Vermont's previous mandatory and voluntary spending limits, citizen polls reflecting the amounts that Vermonters consider to be excessively large donations, its members' own individual experiences as candidates, the testimony of numerous witnesses

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[4] Adherence to voluntary spending limits dropped dramatically between 1993 and 1998. P.A. 28a; J.A. 29, 34.

concerning the appropriate levels for the limits, and the offices to which the limits would apply. Exs. I:92, 254-63, 267; II:443, 533-34, 645-47, 664-80; V:1686-1734; Trs. IX: 203-04, 226-28, X:18-20; *see also* P.A. 32a-33a, 100a. It set the limits at levels assiduously tailored to deter corruption and its appearance while ensuring effective and robust campaigning.[5] It further permitted challengers to spend more than incumbents.

The Legislators also focused on the need to protect against circumvention of Act 64's limits. They imposed limits on party and political committee donations and on expenditures that were coordinated with a candidate. Truly independent expenditures were not restricted.[6]

II. Proceedings Below

A. During ten days of trial, the district court accepted testimony from 34 witnesses, including citizens, officials, candidates, experts and party leaders, and admitted approximately 135 exhibits, amounting to more than 3,000 pages. The court reviewed the legislative record and adopted nine of the Findings supporting Act 64. P.A. 34a-35a; J.A. 20-22.

After weighing the evidence and making credibility determinations, the court concluded that the "threat of corruption in Vermont is far from illusory. Evidence provided by citizen polls and comments by public officials demonstrate that the threat is quite real." P.A. 56a. The public's perception of that corruption is equally clear: "it is beyond argument that the public perceives corruption in the political electoral system." *Id.*

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[5] In 2005, the Legislature tied increases in the expenditure limits to the Consumer Price Index. 17 V.S.A. §2805a(e).

[6] Act 64 combines features from three separate bills. Exs. I:1-25, II:691-706, 707-17. In addition to the challenged limits, it includes reporting provisions, creation of an on-line database with candidate biographies and position statements, and a public funding option for candidates for governor and lieutenant governor. P.A. 1a-20a.

The court ruled that the expenditure and contribution limits of Act 64 directly furthered compelling interests, including deterring actual and perceived political corruption and freeing up officeholders from the demands of fundraising so they can perform their official duties. P.A. 36a-38a, 59a, 63a-66a. It concluded that the levels established for those limits were appropriate for Vermont and would permit effective campaigning. P.A. 39a-44a. Such legislation, the court found, was critical to reverse the erosion of public confidence in elected officials and to maintain the integrity of the electoral system. P.A. 36a-38a, 56a, 59a, 65a-66a. The trial evidence fully supported those determinations.

Trial witnesses recounted numerous examples of the preferential access and treatment given by officials to special interests and large contributors. In stark contrast to ordinary constituents, such persons and entities had their telephone calls returned, obtained meetings with officials, and were afforded a different quality and quantity of attention and responsiveness by politicians. *See* Trs. VII:72-74 (Vermont politicians usually give special consideration to requests from large donors); V:24; VIII:24; IX:167, 194-96.

Evidence demonstrated that such purchased influence impacted or sought to impact a number of governmental actions, including environmental exemptions for the slate industry, modifications in tobacco laws, participation in a land use action, changes to health care reform, defeats of a bottle redemption bill and a food labeling bill, and the creation of a tax exemption. Trs. V:54-56, 183-84; VII:62-74, IX:92-95, 104-09, 120-23, 174-77. The court concluded that consideration of funding sources "frequently shapes the legislative agenda in Montpelier and often determines whether a bill will get enough support from the Senate leadership and committee members to move forward." P.A. 37a.

The need to raise unlimited funds, the court determined, also makes it "increasingly difficult" for officials to pursue

initiatives adverse to large donors and donor groups. P.A. 37a-38a. With an ever-increasing need for monies, candidates always consider what the positions of large funding sources are when staking out a position of their own. Tr. VIII:24-25. Expert testimony from both sides confirmed the link between officials' voting behavior and the sources of their campaign contributions. P.A. 38a.

In addition, the district court validated the Legislature's concern over the public perception of corruption resulting from a system of large contributions and unlimited spending. P.A. 29a, 56a. Sen. Rivers testified that "many ordinary people...believe that their government is not about them, but about powerful, special interests.... [and] that is corrosive and damaging to democracy." Tr. VII:88; *see* Tr. V:170. Plaintiffs' witnesses also recognized the public's concern over the corrupting effect of money in politics. P.A. 36a-37a; Trs. II:212; IV:66-67, 219-20, 259.

To support its finding regarding the perception of corruption, the court further relied upon media reports of officials' comments describing the insidious impact of money on government, and upon survey evidence. P.A. 29a, 37a; Exs. III:763 (Sen. Spaulding: "money is a negative influence on the impartial ordering of priorities and passage or failure of bills"); III:772 (Sen. Shumlin: money "buys access to the system .... [and] it adversely influences a citizen legislature"); Tr. VII:151-52; Ex. III:847-48 (70% of Vermonters believe that the wealthy and large corporations have too much influence over officials, while 74% believe ordinary Vermonters have too little).

Testimony from knowledgeable witnesses also demonstrated that the "arms race" to obtain campaign funds distracts officeholders from their duties and separates them and candidates from interactions with voters. P.A. 38a. Without spending limits, "you become indentured to people who have got the money. So you spend less time on the ideas and more time harvesting the money." Tr. V:116; *see also* J.A. 28

(Landell Plaintiffs' admission). Proof that officials are pulled away from their duties to solicit campaign money from interest groups and donors "came from both Plaintiffs and Defendants." P.A. 36a.

Trial evidence additionally confirms the court's conclusion that candidates can conduct effective campaigns under the spending limits of Act 64. P.A. 43a-44a. Campaigns for political office in Vermont are generally low cost and do not require the raising of sums as large as those in other parts of the country. *See* Randall Br. 32 (conceding same). For example, Vermont ranked 49th in spending among gubernatorial campaigns across the country. J.A. 43.

As the court noted, the low population of Vermont's electoral districts supports the reasonableness of Act 64's spending limits. P.A. 42a. Candidates for statewide office in Vermont compete for votes from a population that is smaller than that of a single California senate district. J.A. 43. Vermont's House districts, the second smallest in the nation, average 4,000 people in a single-member district, and 8,000 people in a two member-district. J.A. 28, 41-42. In 1998, the average number of votes received by winning candidates in a single-member House district was only 1,022. J.A. 42. Vermont's Senate districts are correspondingly small, with about 19,600 constituents per senator. *Id.*

The small population of these electoral districts means that voters expect low-cost campaign methods and direct contact with candidates. P.A. 44a & n.22; Trs. III:29; V:39-40; VII:17; IX:134; X:185; Exs. IV:1348, 1437; V:1826; J.A. 41 (all discussing door-to-door campaigning). Witnesses for both Plaintiffs and Defendants described effective, inexpensive methods of campaigning commonly used in Vermont, including: debates, Trs. I:59-60; II:200-01; literature drops and booths at fairs, Trs. I:61; II:195-95; Ex. IV:1348, 1437; spaghetti or church suppers and barbecues, Tr. IX:134-35, 220-21; sign-waving and supermarket visits, Tr. IX:134-35; public

access or cable TV ads, Trs. IV:49-51; IX:134-35; press releases to obtain free media coverage, Tr. I:61; website and e-mail, and distribution of candidate's biography and position statements through the Secretary of State's website, Tr. IV:57-58, *see also* P.A. 44a; J.A. 31. Indeed, few candidates hire paid campaign staff or advertise on television, and, even when used, television ad costs in Vermont are relatively low. P.A. 44a; J.A. 24-30 (admitting same); J.A. 41; Trs. VII:16-17; IX:49, Ex. VII:2699.

The district court specifically rejected the testimony offered by Plaintiffs that one needed to spend nearly $1 million to run an effective campaign for governor or $500,000 for any other statewide campaign in Vermont, calling those claims "wholly unreasonable." P.A. 40a, 43a. The court found that "[t]he majority of major party candidates for statewide office in the last three election cycles spent less than what the spending limits of Act 64 would allow." P.A. 43a.

For legislative races, data analyzed by the State's expert and relied upon by the court revealed that average spending for House seats was almost uniformly below the levels set in the new statute. P.A. 39a-40a, 57a; J.A. 88. In the two-member, three-member and six-member Senate districts, candidates under-spent the limits applicable to these districts by amounts ranging from $590 to $7,120. Only in single-member Senate districts did average spending exceed the new limits. J.A. 87.

Voluminous trial evidence also supported Act 64's contribution limits. Both the culture and economy of Vermont led the district court to conclude that even small donations are strong acts of political support. P.A. 41a-42a. It found that the law's contribution limits "accurately reflect the level of contribution considered suspiciously large by the Vermont public." P.A. 59a (citing testimony of seven witnesses, including three of the Plaintiffs). The court determined that Act 64's contribution limits would have affected fewer than 10% of

all contributions made over the three preceding election cycles. P.A. 57a.

After evaluating the trial testimony, the court further found that "the more credible evidence shows that [effective] campaigns would indeed be possible" under the contribution limits set by Act 64. P.A. 40a-41a & n.20 (citing testimony of "candidates, campaign managers, and past and present government officials"). Analysis of the one race that had been held at the time under Act 64 confirmed that finding. P.A. 41a, 58a (Burlington mayoral candidates raised large sums and ran effective campaigns under $200 contribution limit). Finally, the court found that Act 64's limits compared favorably to those that had been upheld in the larger and more populous states of Missouri, Maine and Florida. P.A. 57a-58a & n.24.

The court rejected the contention that the spending and contribution limits of Act 64 would advantage incumbents. Evidence established both that the prior campaign finance system had entrenched incumbents, Trs. VII:148; X:33; 48; Exs. II:525, 529; V:1692, 1694, and that Act 64 would increase electoral competition, Trs. V:52, 148; VIII:56; IX:131-32; X:161.

Ultimately, the district court upheld nearly all of the contribution limits of Act 64.[7] P.A. 24a-25a. Regarding the expenditure provisions, the court found that they were supported by compelling interests and were set at appropriate levels for Vermont. P.A. 66a. It noted: "Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64, this court understands why it included spending limits as part of its comprehensive campaign finance bill." *Id.* The court refused to sanction the limits, based only on its view that all spending caps were prohibited by *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). P.A. 66a.

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[7] The court invalidated Act 64's limits on out-of-state contributions and held that the limits on political party contributions to candidates were too low. P.A. 67a-68a, 76a.

B. After carefully and independently reviewing the full trial court record, the court of appeals upheld the lion's share of Act 64. P.A. 111a, 125a, 144a, 188a-89a.

1. Over a dissent, the Second Circuit held that *Buckley* was not a *per se* bar to consideration of spending limits. It concluded that two compelling interests supported Act 64's expenditure limits. First, the court ruled that Vermont has a compelling interest in safeguarding the political process from the corruption and the appearance of corruption created by unfettered campaign spending and the contributor-dominated system that results from it. Given an unlimited desire for funds, large contributors and special interests with access to significant sources of contributions, are allotted "greater access to public office holders—and thus greater influence—*on account of* those citizens' ability and willingness to pay for candidates' campaigns." P.A. 134a. This reliance often causes officials to adopt positions, set agendas, or take other actions either to secure funding or to ensure continued favor with past donors. P.A. 130a-31a. It further makes it especially hard for officials to take positions that would cut them off from large sources of campaign monies. P.A. 131a-33a.

The court found that Vermonters rightly perceive that "the attention of their public representatives may be available for a price." P.A. 129a. Such a practice, "is pernicious because it is bought," and it "exacerbat[es] cynicism and weaken[s] the legitimacy of government power." P.A. 134a. Act 64's spending limits, the court ruled, directly further the goals of deterring such corruption, ensuring accessibility and accountability of officials, and protecting the public's faith in the integrity of government. P.A. 134a-35a, 144a n.18, 149a-50a.

Second, the Second Circuit determined that Act 64's spending limits were additionally supported by Vermont's compelling interest in protecting candidates' and officials'

time.[8] The court ruled that the demands of seeking campaign dollars often force officials and candidates to engage in fundraising rather than attending to their public duties or interacting with voters. P.A.135a. "Vermont presented powerful evidence concerning the time pressures which the prospect of unlimited expenditures places on candidates for office." P.A. 139a; *see* P.A. 144a. This pressure to raise funds not only diverts officials from the public's work, it narrows the scope of the views and information they and candidates receive because their available time is consumed by donor groups with their own agendas. P.A. 140a.

The Second Circuit further concluded that the expenditure limits were set at levels that directly advanced the above compelling interests while permitting effective campaign advocacy. P.A. 148a-57a. It ruled that Plaintiffs' emphasis on certain high-spending races provided no basis to overturn the law. P.A. 156a. "[A]mple evidence" established that effective campaigns could be run under Act 64. *Id.* Nonetheless, the Second Circuit remanded for additional narrow tailoring analysis regarding other possible regulatory options and whether higher expenditure limits might equally serve the identified compelling interests. P.A. 157a-158a.

2. The Second Circuit unanimously upheld virtually all of Act 64's contribution limits, including the party contribution limit invalidated by the lower court. P.A. 168a-170a, 177a-78a, 183a-84a (rejecting only Act 64's out-of-state contribution limit). The court concluded that those limits deter the "real and perceived threat of corruption in Vermont," and are closely drawn to ensure effective campaigns. P.A. 171a-72a. The court also upheld the rebuttable presumption of 17 V.S.A. §2809(d)(P.A. 9a). P.A. 183a.[9]

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[8] The State asserted five compelling interests, only two of which were examined by the court below. P.A. 127a, 145a.

[9] The court also remanded three matters that are not presently before this Court, including the constitutionality of treating related

SUMMARY OF THE ARGUMENT

Vermont enacted spending limits because the never-ending desire for campaign money had distorted the political process and undermined public faith in those who govern. Even with contribution limits in place, candidates and officials still devote great time and resources to courting industries or special interest groups with access to large blocks of contributions. As the record here convincingly shows, the resulting close ties among such donor groups, candidates and elected officials often determine what positions candidates and officials take on issues, which matters are given legislative priority, who gets access to candidates and officials, and where candidates and officials spend their time. This type of influence and access is "pernicious because it is bought." P.A. 134a.

The Vermont Legislature carefully crafted Act 64 to address these grave concerns and carry out the State's prime duties of ensuring the integrity of its political processes and maintaining citizen confidence in government. While this Court invalidated federal spending limits in *Buckley*, the same result does not follow here. In contrast to *Buckley*, the instant record establishes that spending limits directly further the compelling interests of deterring corruption and its appearance, and of protecting the time of officials and candidates from limitless fundraising. Expenditure limits militate against the undue access and influence now afforded donors and allow officials to decide issues based on the merits, not the wishes of their financiers. They permit officials to attend to their public duties instead of seeking private dollars, and assure that candidates and officials have the opportunity to hear the views of all citizens, regardless of whether they are donors. Act 64's spending limits are specifically targeted to further such compelling interests and are set at levels sufficient to allow vital and effective campaigning. Indeed, between 1994 and 1998,

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expenditures as candidate expenditures and of limiting transfers between state and national parties. P.A. 168a, 180a-81a.

the vast majority of candidates spent at or below the levels set by Act 64. As such, the limits are narrowly tailored.

While such weighty interests and tailoring satisfy *Buckley's* exacting scrutiny, should the Court disagree, the State asks that the Court revisit the constitutional standard for spending limits set out in *Buckley*. That case did not fully consider that critical constitutional interests, including some going to the very core of our form of government, lie on both sides of this issue. Balancing of those interests, as the Court has done in other contexts, leads to the conclusion that Act 64's spending limits are constitutional.

Plaintiffs' challenge to Act 64's contribution limits does not withstand inquiry. The Court has frequently found that such limits serve the critical interests of reducing actual and perceived political corruption. The record here confirms those judgments and details numerous instances where contributors received or were perceived to have received undue access to and influence over officials. Such access and influence impacted government policy and reinforced the public's perception that "big money" controls what happens at the state capital. To address those concerns, Act 64's contribution limits are directed at amounts considered "suspiciously large" and would have affected fewer than 10% of the contributions made between 1994 and 1998. The limits permit both meaningful contributions and effective campaigns at all levels. They are fully constitutional.

Act 64's limits on contributions by political parties to candidates are equally valid. They, too, deter real and apparent corruption and also avoid evasion of Act 64's other limits. Parties are not constitutionally entitled to higher contribution limits than other donors. Act 64 allows parties to make meaningful contributions to candidates, and they remain free to engage in unlimited independent spending to support candidates or engage in traditional party building activities, such as get-out-the-vote efforts.

Plaintiffs' argument against the rebuttable presumption of 17 V.S.A. §2809(d)(P.A. 9a), misconstrues the law's treatment of coordinated expenditures. Act 64 places no limit on independent spending. Section 2809(d) establishes only a non-conclusive, evidentiary presumption for a narrow category of expenditures most likely to have been coordinated with a candidate. Under Vermont law, such a presumption arises only at trial and shifts just the initial burden of production, not the burden of persuasion. It does not require candidates or parties to disassociate themselves from a communication or take any action whatsoever. It imposes no burden of constitutional magnitude and does not chill speech.

ARGUMENT

I. Act 64's Spending Limits Are Constitutional

Vermont's spending limits pass the exacting scrutiny set out in *Buckley*. 424 U.S. at 44.[10] They directly further the critical interests of deterring corruption and its appearance, thereby fulfilling the State's core duties of ensuring the integrity of Vermont's electoral process and restoring public confidence in government. Expenditure limits additionally serve the equally compelling interest of assuring that candidates and officeholders devote less time to fundraising and more time to interacting with constituents and attending to their duties. Vermont's nine decades of experiments with campaign

[10] Any suggestion that *Buckley* precludes such analysis is unfounded. *Buckley* rejected spending caps based only on the summary judgment record before it and the implicit prediction that contribution limits and disclosure would work to end corruption. The contrary record here establishes that spending limits are necessary to address corruption and its perception in elective politics. Likewise, *Buckley* did not even consider, much less reject, the time protection interest as a basis for upholding spending limits. 424 U.S. at 55-57. Respondents VPIRG, *et al.*, fully discuss why *Buckley* does not bar consideration of spending limits or the asserted compelling interests, and the State adopts that argument.

disclosure laws, contribution limits, and voluntary expenditure limits, P.A. 26a-27a, combined with the record created below, demonstrate how compelling these interests are and fully justify the particular levels of spending caps set by the Legislature to safeguard Vermont's system of government.[11]

A. States Have Unique Duties To Protect Their Electoral Systems And Maintain Citizen Faith In Government

This Court has often recognized the special responsibility a state has to "preserv[e] the integrity of its election process." *Burson v. Freeman*, 504 U.S. 191, 199 (1992)(quotation omitted); *see Gregory v. Ashcroft*, 501 U.S. 452, 461-63 (1991); *Oregon v. Mitchell*, 400 U.S. 112, 125-26 (1970)(opinion of Black, J.). "Preserving the integrity of the electoral process, preventing corruption, and sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government are interests of the highest importance." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978)(quotation omitted).

The importance of protecting states' representative structures and their ability to determine and police the methods

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[11] Judge Winter's dissent incorrectly relies upon nonrecord evidence to argue against Act 64. *See, e.g.*, P.A. 238a; *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488 n.3 (1986)(court "must affirm or reverse upon the case as it appears in the record"). Indeed, the dissent illustrates the perils of relying on such evidence, which the parties have had no opportunity to explain or contest. For example, the suggestion that voter turnout in the 2000 election was "perhaps...record breaking," P.A. 278a, is mistaken for several reasons: (1) 2000 was a presidential election year, which has higher turnout; (2) there were more eligible voters in 2000; and (3) voter turnout in 2000 *as a percentage of Vermont's voting age population* was lower than in some previous presidential election years. *See* Vermont Elections Data, *at* http://vermont-elections.org/elections 1/1974to2004RegPop.html. Nonrecord evidence of this sort is not appropriate for judicial notice under Fed. R. Evid. 201.

of electing their own officials is enshrined in the Constitution itself. U.S. Const. art. I, §§2, 4; art. IV, §4; amend. X; *see Gregory*, 501 U.S. at 463; *Storer v. Brown*, 415 U.S. 724, 730 (1974). And, Vermont's Constitution specifically assures Vermont citizens that they shall have an equal ability to vote, run for office and have equal access to members of the Legislature, and that elections shall be "free and without corruption." Vt. Const. ch. I, art. 8; ch. II, §8 (Statehouse "open for the admission of all persons").

Indeed, avoiding corruption and the appearance of corruption in government and elections is "critical...if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley*, 424 U.S. at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)); *see Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000); *Bellotti*, 435 U.S. at 787 (1978)(state interest in "preventing diminution of the citizen's confidence in government"). Act 64's spending caps directly further the State's paramount duties of preventing real and perceived corruption and restoring public confidence in the electoral system.

B. Vermont's Spending Limits Deter Real And Apparent Corruption

While contribution limits are assuredly an essential weapon against political corruption, *see infra* Section III, they do not address all its manifestations. As Vermont's experience shows, without spending limits candidates constantly fear that their opponents may outspend them, and they are forced to seek larger and larger campaign war chests. Tr. VIII:57; *see also* Trs. V:32-33; VII:75-78; IX:133-34. In such an "arms race" for funds, special interests exert undue influence upon lawmakers. P.A. 134a. Whether through bundling or grouping of donations from multiple members of an industry or group, or otherwise, special interests remain major funding sources for candidates. Exs. I:218-19; III:0783; I:196 ("[if] all the money that came into

me ... were people that I could identify were teachers, I would know I'm in the NEA's pocket"); Tr. VIII:192-94 (in small state a single interest can exert significant pressure through organized giving).

What the special interests receive in return are access to and untoward influence over candidates and officials. As the district court stated, the system of unlimited spending makes it very difficult for officials to take positions adverse to their funding sources, even if the officials disagree with them. P.A. 37a-38a. Spending limits reduce the candidates' need for funds thereby relieving the pressure to afford special interest groups undue access and influence based solely upon their financial strength. Trs. IX:195-96; VII:88.

The record is punctuated by revealing testimony describing the preferential access and influence accorded special interests due to their ability to generate campaign funds. Senate President Shumlin confessed that special interests obtain access on that basis: "I guarantee you it happens." Ex. I:297; *see also* Exs. I:341 (senator acknowledged undue influence of money from "Wall Street, the banking industry, the insurance industry, the pharmaceutical industry"); II:505 (fundraising and lobbying "completely linked"); I:375 (Monsanto spending coincided with legislative consideration of milk labeling bill); III:902 (Governor confessed "money does buy access"). Peter Smith, former holder of numerous state offices, explained that politicians "will spend a different kind of time and a different kind of attention" on those who control large blocks of contributions. Tr. VIII:24.

With an unlimited desire for funds, officials are forced to keep one set of eyes on the merits of an issue and another on their pocketbooks. Indeed, before taking a stance on a piece of legislation, legislators typically ask, "what's the industry's position, what's the union position...what does the money want?" Tr. VIII:24-25. Citizens appreciate all too well the situation. Sen. Ready testified that people think "'the big

money controls everybody in Montpelier....' They think it's all wrapped up and that the special interests control it and, quite frankly, they aren't that wrong." Tr. IX:119.

As Lt. Governor, Smith observed first-hand how the fear of losing several contributors at once has the potential to sway legislative action. Tr. VIII:39-41. He was called upon to cast the tie-breaking vote concerning whether optometrists, as well as ophthalmologists, would be allowed to administer eye drops. "There were lobbyists and individual doctors...all over the statehouse." Tr. VIII:41. It became clear to him that these groups were banking on the power they could obtain through campaign contributions: "the merits of the case were, if you will, infused...by the financial power of the groups and the individuals who were contesting the bill." Tr. VIII:42.

The record is replete with examples of groups asserting their financial strength to gain access to officials and exert undue influence on governmental outcomes. Democratic Party leaders reminded Legislators that they risked being "shut off in the next election cycle from any contributions" from pharmaceutical interests unless they voted consistent with the industry's views. Tr. VII:66; Ex. V:1763-64 (summary of pharmaceutical contributions). Likewise, the Senate President refused to support a bill requiring labeling of genetically-engineered food because he feared loss of the financial support of food manufacturers. Tr. VII:67-71. He stated: "We've already lost the drug money, and I don't need to lose the food manufacture money too. So I'm not going to sign the bill." Tr. VII:70; P.A. 131a; *see also* Trs. VIII:47-48 (NRA use of fundraising ability to attempt to influence officials' position); IX:104-07, 110-11, 175; Exs. II:425-26; V:1766 (all noting beverage industry contributions as significant in preventing expansion of bottle redemption bill); V:55-56 (tobacco industry contributions handed out after defeat of tobacco bill). When a candidate does not know how much her opponent may raise, it is much harder to turn down such compromising donations.

Similarly, several trial witnesses described contributions by slate quarries to members of a legislative study panel that was considering a regulatory exemption for the quarries. Contrary to the usual practice, the Senate President appointed panelists who were not members of the Natural Resources Committee -- the committee that had jurisdiction over this topic. The President and members of the study committee received contributions of $500 each from the slate industry. Tr. IX:92-94; Ex. V:1765. When the quarries were exempted from regulation, neighbors perceived that the money and power of the quarries had drowned out citizens' voices. Trs. IX:103-04 ("they felt powerless"); VII:63-65; Exs. III:785 ("hard to top this [incident] for blindness to appearances and propriety"); III:787.

Even if the preferential access and influence of special interests results in no tangible benefits to the contributors, "it certainly [gives] the 'appearance of such influence.'" *McConnell v. FEC*, 540 U.S. 93, 150 (2003) (quoting *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) (*Colorado II*)). And those perceptions directly undermine the public's faith in government. As Sen. Rivers testified:

> Sometimes I have difficulty getting people to agree to register to vote, and they say, you know, in the end, money decides everything. My vote doesn't matter.

Tr. VII:65; *see* Tr. IX:119 ("People don't believe their vote counts.").[12]

Indeed, witnesses for both sides "acknowledged the deterioration of public confidence" in Vermont. P.A. 36a-37a; *see* Trs. IX:57-58 (voters believe that high spending campaigns reflect candidates running for special interests); IX:129-30

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[12] Encouraging citizens to vote is "an essential state objective: for the constitutional order must be preserved by a strong, participatory democratic process." *California Democratic Party v. Jones*, 530 U.S 567, 587 (2000)(Kennedy, J., concurring).

(with unlimited campaign spending, average citizens do not feel like "players"); V:114-15 (constituents feel powerless); X:186-87; Exs. II:482-83 (money is distancing people from government); III:847-48 (survey showed Vermonters extremely concerned about influence of special interests, as compared with ordinary citizens); Trs. V:55-56; VII:62-63; X:180; Ex. III:806-09 (all noting perception of impropriety from tobacco industry donations).

The access and influence of special interests described above is corrupt "because it is bought." P.A. 134a. Plaintiffs' suggestion that it does not fall within the Court's definition of "corruption" is totally at odds with precedent. *McConnell* judged the concern that officials would make decisions based "not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions" to be "[j]ust as troubling...as classic *quid pro quo* corruption." 540 U.S. at 153. Even if those decisions "occur only occasionally, the potential for such undue influence is manifest." *Id.*

Corruption thus extends beyond clumsy, money-for-vote chicanery, to "more subtle yet equally dispiriting forms of corruption," *id.*, that threaten the integrity of the political process. Such corruption includes the use of donations to "gain access to high government officials," *id.* at 150, and extends to "the broader threat from politicians too compliant with the wishes of large contributors," *Shrink*, 528 U.S. at 389 (quoting *Buckley*, 424 U.S. at 28); *see McConnell*, 540 U.S. at 150; *Colorado II*, 533 U.S. at 441 (corruption includes "undue influence on an officeholder's judgment"); *Buckley*, 424 U.S. at 27, 29-30, 45 & 67 (corruption concerns "improper influence" or "groups desiring to buy influence" or "post-election special favors that may be given in return" for generous support).

The public's perception of such political corruption is also of great constitutional concern. *Shrink*, 528 U.S. at 388-89 (citing *Buckley*, 424 U.S. at 26 and *Letter Carriers*, 413 U.S. at

565). As the Court stated in *FEC v. Nat'l Right to Work Comm.* (*"NRWC"*), the suggestion of such corruption "directly implicate[s] the integrity of our electoral process." 459 U.S. 197, 208 (1982)(quotation omitted). Since Act 64's spending limits directly counter political corruption and its appearance, they further interests of the highest order.

C. Vermont's Spending Limits Protect The Time Of Officials And Candidates

Act 64's spending limits are also supported by a second compelling justification: protecting candidates' and officials' time from the demands of excessive fundraising. Both lower courts correctly determined that the need for unlimited campaign money often forces officials away from their governmental duties and pressures them and all candidates to allot their limited available time to donors rather than constituents. This not only results in preferential access to monied interests and less effective governing, it also limits the scope of the views and perspectives heard by officials and candidates. J.A. 20-21 (Findings (a)(1), (a)(4), (a)(8)).

Members of this Court have noted the compelling nature of the interest in freeing officeholders and candidates from the stranglehold of fundraising. While *Buckley* merely mentioned that interest in connection with upholding the public financing portion of the Federal Elections Campaign Act ("FECA"), 424 U.S. at 96, Justice Kennedy has suggested the possibility of "a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising." *Shrink*, 528 U.S. at 409 (Kennedy, J., dissenting); *see Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 649-50 (1996)(Stevens & Ginsburg, JJ., dissenting) ("*Colorado I*").[13]

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[13] Courts of appeals have also found the time protection interest to be compelling. *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993).

The vital governmental interests in diminishing distractions to officeholders, enabling candidates to engage with voters in mutual communication, and encouraging officials to be mindful of and responsive to the broad array of citizens -- not to a select few -- are enshrined in the Vermont Constitution itself. It declares that all power is "originally inherent in and co[n]sequently derived from the people, therefore, all officers of government...are their trustees and servants; and at all times, in a legal way, accountable to them." Vt. Const. ch. I, art. 6. It further provides that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community...." Vt. Const. ch. I, art. 7. The critical importance of such concerns cannot validly be challenged.

The legislative and district court records here provide ample evidence supporting the interest in time protection. Given the desire for increasing amounts of campaign funds, officials are continually forced to choose between attending to their duties and shoring up financial support. All too often, the official duties lose out. As the Senate President testified to one committee:

> I can't tell you how many times I'm walking down this hall and someone grabs me [ ] and says, could you meet with so and so, and I know that preferably my answer would be no, I have other work to do, but I also have to think about [elections in] '98.

Ex. I:291; *see* J.A. 21-22 (Finding (a)(11)); Exs. I:92 (law will allow candidates "to concentrate more on issues rather than raising public money"); I:326, 358 (similar); III:793 ("distraction of fundraising" caused Governor to focus on large fundraisers).

Fearing their opponents' war chests and concerned about being outspent, Trs. V:51; VIII:57-58; Ex. I:233, candidates and

officials typically grant monied interests excessive portions of their limited time. As a veteran official stated, the further one progresses politically, the more time one spends raising money and paying attention to big money contributors. Tr.VIII:19, 23-24; *see* Ex. V:1845 (more likely to spend time with large funding sources). If officials have only an hour to respond to telephone calls, donors will get their calls returned. Trs. V:29-30; IX:166-67; Ex. III:781. In short, the unbridled need for campaign cash compels candidates and officials to afford greater and greater amounts of their time to their funding sources. J.A. 20 (Finding (a)(2)).

When officials and candidates spend time "talking to large contributors, they are not talking to others." Trs. IX:194; *see* IX:128-29 (fundraising keeps officials "locked away" and not "out with the public"). The information and perspectives they hear on issues are primarily those of the narrow interests that provide them monetary support. Consequently, concerns of the wealthy "dominate[ ] the political process to the exclusion of the voices and ideals and aspirations of poor and working class and middle class people." Tr. V:170; *see* Tr. V:116 (officials develop relations with those who have money not ideas); Tr. VII:59-60 (large sponsors of senate fundraisers include major drug companies); Tr. IX:113, 116-17. This directly affects candidates' and officials' views on the issues and distorts the representative nature of democracy.

Under a system of unlimited spending, the important views of Vermonters whose money must go to mortgage payments and heating bills often go unheard. Ex. V:1845-46; Tr. IX:104; *see also* Tr. V:130, 143; Ex. V:1838 (all noting value of hearing views of constituents). The "collective discussion and debate" among elected officials and citizens that the Framers viewed as a cornerstone of our republican form of government is thereby tilted in favor of monied interests. Cass Sunstein, *The Republican Civic Tradition:*

Beyond the Republican Revival, 97 Yale L.J. 1539, 1549, 1576-78 (1988). This makes officeholders accountable to money, not to the citizens of Vermont.

By releasing candidates from the pressure to raise limitless sums, Act 64 restores balance to that "discussion and debate," permits officials to attend to the people's duties, and "improve[s] the health of the democratic system." P.A. 59a; *see* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All,* 94 Colum. L. Rev. 1281, 1298 (1994)(reducing fundraising time enhances "quality of representation"). Such interests are undoubtedly compelling.

D. Vermont's Spending Limits Do Not Favor Incumbents

Plaintiffs' contention that Vermont's spending caps unfairly discriminate against challengers and non-traditional candidates is meritless. "Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." *Buckley*, 424 U.S. at 31, 33; *Shrink*, 528 U.S. at 389 n.4 (rejecting notion that contribution limits applicable to all favor incumbents).[14] No proof of intentional discrimination exists here. Just the opposite.

Many people supported Act 64 because they believed it would increase the number and diversity of challengers. Ex. II:649; Tr. VII:148; *see* Exs. I:376-77 (Governor's Commission on Women urged campaign reform, noting that then-existing system "favors the wealthy, the incumbent and the white males"); I:92 (Act 64 permits greater accountability of incumbents and improves challengers' chances); Tr. VII:86 (Act 64 does not disadvantage non-traditional candidates).

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[14] *Shrink* described this as an equal protection argument. Plaintiffs' amended complaints allege no such claim.

Most importantly, it is incumbents who benefited most from the system in place prior to Act 64. Tr. X:19 ("old law was the best incumbency protection money could buy"); *see* Ex. III:1057-58 (noting high re-election rate of incumbents). Incumbents typically have greater access to large, monied interests, can generate large war chests that dissuade potential candidates from mounting challenges, and can outspend opponents. Trs. IV:12; VI:94-95; IX:127, 231; X:33; *see* 424 U.S. at 32. As a result of those advantages, incumbents were often uncontested in Vermont. Tr. X:33; Ex. V:1694. Spending caps work directly *against* incumbents by diminishing such impediments to competition. Trs. VII:79; IX:144-45.

Contrary to Plaintiffs' assertions, challengers need not outspend incumbents to win. Evidence below showed that challengers can be competitive so long as they are not greatly outspent by incumbents. Tr. X:82-84. Since Act 64 specifically grants non-incumbents the ability to outspend incumbents, challengers are given a significant advantage. 17 V.S.A. §2805a(c)(P.A. 7a); P.A. 151a. Plaintiffs submitted no evidence supporting a claim of invidious discrimination against non-incumbents; their arguments were and still are entirely "speculative." P.A. 60a, 151a-52a.

E. Vermont's Spending Limits Are Narrowly Tailored

The Second Circuit's complex, multi-step tailoring analysis and its remand to examine alternatives and possibly fine tune the spending levels are unnecessary. The record here fully supports the conclusion that Act 64's spending limits are a narrowly tailored means of protecting the integrity of Vermont's electoral system.[15]

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[15] The dissent below and the Randall Plaintiffs, Br. at 4-5, exaggerate the scope of the term "expenditure" to support their assertions. 17 V.S.A. §2801(3)(P.A. 1a). Since Plaintiffs did not challenge that definition as overbroad or vague in their complaints, the lower courts did not have the benefit of the State's authoritative construction of the

Since 1916, Vermont has sought effective methods for deterring actual and apparent political corruption. P.A. 26a-27a. Disclosure laws, contribution limits and voluntary spending caps did not, on their own or in concert, totally ameliorate those dangers. Vermont has, thus, examined and employed feasible alternatives to spending limits and found them wanting.[16] J.A. 20-21 (Findings (a)(2), (a)(3), (a)(9)).

Likewise, the Second Circuit's remand to determine whether higher spending limits would be as effective as those of Act 64 is unworkable because it assumes that there is a single dollar amount that will satisfy the Constitution. It leads to the hopeless task of trying to decide whether a limit $1,000 higher would be as effective as the chosen limits at combating corruption and its perception and at protecting candidates' and officials' time. P.A. 162a. Such meticulousness has not been demanded by this Court to satisfy narrow tailoring and would amount to a virtual "straitjacket that disables government from responding to serious problems." *Denver Area Educ. Telecom.*

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term. While Plaintiffs would have the Court believe that "expenditure" might include virtually all conduct, the State has not construed it so expansively. For example, expenses of litigating issues under Section 2809(e) are not expenditures, for they are not (as the statute requires) "paid...for the purpose of influencing an election." Similarly, the State does not interpret traditional volunteer activity to fall within the definition of expenditure.

[16] Some of the alternatives suggested by Plaintiffs and their *amici* already exist in Vermont, yet corruption and time concerns remain. *See, e.g.*, 2 V.S.A. §266 (prohibition on accepting campaign contributions from lobbyists during session); and House and Senate Rules, Part III, Rule 10, *at* http://www.leg.state.vt.us/misc/rules2.htm (members are to be present for all sessions and committee meetings). Similarly, VRSC's suggestion, Br. at 43-44, that officials hire staff to perform their duties while they fundraise, only guarantees that elected officials will spend even more time neglecting their duties. It would also undermine the citizen legislature that Vermont sought to preserve through Act 64, Ex. I:294, and would do nothing to deter corruption.

Consortium v. FCC, 518 U.S. 727, 741 (1996); *see Burson*, 504 U.S. at 209 (rejecting notion that state must "perfectly tailor[ ]" size of picket-free zone); *see also McConnell*, 540 U.S. at 208 (tailoring should permit government to address problem "most acute to the legislative mind").

While the Court has not fully defined the scope of tailoring in the expenditure limits context, Act 64's limits are "precisely targeted to eliminate" the evils that justified the law. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990). Further, as the record convincingly establishes, they permit lively and effective campaigning at all levels. P.A. 43a-44a, 152a-57a. As such, they are sufficiently tailored.[17]

II. Alternative Constitutional Analyses Support Vermont's Spending Limits

The State believes that Act 64's campaign expenditure limits survive the exacting scrutiny set out in *Buckley*. If not, then the Court should revisit *Buckley* and consider alternative constitutional approaches to spending limits. Specifically, where two or more constitutional interests are in conflict, a long line of this Court's decisions has counseled in favor of balancing those concerns to determine which should take precedence under the circumstances presented. *See Shrink*, 528 U.S. at 401-03 (Breyer & Ginsburg, JJ., concurring)(collecting cases); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991)(balancing fair trial rights against First Amendment interests); *Republican Party v. White*, 536 U.S. 765, 793 (2002)(Kennedy, J., concurring)(First Amendment right can give way to avoid "impairment of some other constitutional right"). Under such an analysis, the expenditure caps of Act 64 are constitutional.[18]

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[17] The State adopts the full discussion of tailoring contained in the brief of Respondents VPIRG, *et al.*

[18] While such balancing may be performed consistent with *Buckley*, 528 U.S. at 401-03 (Breyer & Ginsburg, JJ., concurring), it also stands alone as a basis for upholding spending restrictions.

Spending limits advance constitutional concerns that go to the very structure of government. As argued above, states have a constitutional imperative to ensure the integrity of their electoral processes. *McConnell*, 540 U.S. at 137. Where, as in this case, the Legislature has evidence that unfettered spending has corrupted its governmental system, it must be able to take reasonable protective action. In *Burson v. Freeman*, for example, the Court balanced the harm to the electoral process presented by the appearance of placards at polling places against the First Amendment right of persons to express their views through such signs. The Court determined that the minimal intrusion on the latter's interest was more than justified by the necessity of ensuring the integrity of the electoral process. 504 U.S. at 198-211; *see Letter Carriers*, 413 U.S. at 565-67 (upholding Hatch Act because citizens must have faith that government actors are unbiased); *Elrod v. Burns*, 427 U.S. 347, 368 (1976) ("Preservation of the democratic process is certainly an interest protection of which may in some circumstances justify limitations on First Amendment freedoms.") (plurality opinion).

Indeed, even before the First Amendment was drafted, the Constitution assured to all citizens a republican form of government. U.S. Const. art. I; art. IV, §4. The United States and Vermont fulfill those guarantees by locating ultimate power with the citizens who then elect officials to represent their interests.[19] *See Largess v. SJC*, 373 F.3d 219, 227 (1st Cir. 2004); Federalist Nos. 37 & 39 (under republican government all power derived from the people). As this record shows, however, the race for funds sometimes pressures officials to make decisions based on their own sense of obligation to past funding sources or their own need for future campaign monies.

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[19] The Framers believed that such "representation and jury trial were dual securities for the first great class of personal rights." Jack Rakove, ORIGINAL MEANINGS, POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 295 (1996).

McConnell, 540 U.S. at 153. Such a result undermines a core component of democracy and creates a government that is not "open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

The admittedly weighty First Amendment interests of candidates do not surpass the constitutional interests described above. Candidates choose to enter politics and ought to abide by appropriate rules and regulations established to protect the fairness and integrity of that system. Act 64 imposes a reasonable limitation on the amount a candidate may spend in that setting.[20] Since effective and vibrant campaigns can be run under Act 64's limits, any burden on candidate speech is not severe.[21] Balanced against the significant constitutional interests directly furthered by spending limits, those restrictions are more than justified. As Learned Hand stated in another context, the "gravity of the 'evil' discounted by its probability, justifies such invasion of free speech as is necessary to avoid the danger." *United States v. Dennis*, 183 F.2d 201, 212 (2nd Cir. 1950), *aff'd*, 341 U.S. 494 (1951). Constitutional restraints must be flexible enough to allow states to serve as "laboratories" to experiment with balancing such concerns, as Vermont has done with Act 64. *See, e.g., Whalen v. Roe*, 429

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[20] Prior to *Buckley*, numerous states and localities had long functioned with spending limits. Internationally, many democracies, including Canada and England, also adhere to such limits. Roland Homet, Jr., *Fact-Finding in First Amendment Litigation: the Case of Campaign Finance Reform*, 21 Okla. City U. L. Rev. 97, 147 (1996).

[21] In fact, Act 64's spending limits will likely *enhance* First Amendment interests by improving candidate-voter interaction; increasing issue-based campaigns; fostering citizen interest in campaigns; and boosting the number of competitive races. *See Colorado I*, 518 U.S. at 649-50 (Stevens & Ginsburg, JJ., dissenting).

U.S. 589, 597 (1977); *see also United States v. Lopez*, 514 U.S. 549, 581 (1995)(Kennedy, J., concurring); J.A. 109.[22]

III. Vermont's Limits On Political Contributions Are Constitutional

Vermont's contribution limits are in keeping with recent and familiar Court precedent. In an unbroken string of decisions, this Court has consistently upheld the validity of laws limiting contributions to candidates because they directly serve the vital interests of deterring corruption and the appearance of corruption in politics. *See McConnell*, 540 U.S. at 137-38 & n.40 (collecting cases and noting strong *stare decisis* implications from the Court's contribution limits jurisprudence). Because of the "limited burdens they impose on First Amendment freedoms," *id.* at 136, contribution limits are not subject to full exacting scrutiny review, and legislative determinations concerning the need for particular limits are entitled to substantial deference. *Id.* at 137; *Shrink*, 528 U.S. at 386-88; 424 U.S. at 21. Even a contribution limit "involving 'significant interference' with associational rights, could survive if the Government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest,' though the dollar amount of the limit need not be 'fine tun[ed].'" *Shrink*, 528 U.S. at 387-88 (quoting *Buckley*, 424 U.S. at 30); *see McConnell*, 540 U.S. at 134-37.

The record here easily satisfies that standard and shows that Act 64's limits directly advance critical interests and permit fully effective campaigning.

A. Vermont's Contribution Limits Deter Actual And Perceived Corruption

1. While the instant record contains abundant proof that, even with its prior contribution caps, campaign donations had

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[22] The State adopts those portions of the brief of Respondents VPIRG, *et al.*, suggesting alternative compelling interests and constitutional approaches supporting spending limits.

fostered the reality and appearance of corruption in Vermont, the quantum of proof necessary to validate such justifications is not exacting. The *Shrink* Court flatly rejected a line of cases from the Eighth Circuit, still cited by the Plaintiffs, *see, e.g.*, VRSC Br. at 12, that had required exhaustive proof of actual corruption or its perception before contribution limits would be upheld. This Court ruled, instead, that the findings made in the course of the *Buckley* litigation are themselves sufficient to establish that legislative concerns about corruption and the appearance of corruption stemming from large contributions are not "'illusory.'" *Shrink*, 528 U.S. at 391 (quoting *Buckley*, 424 U.S. at 27); *see McConnell*, 540 U.S. at 117 (noting congressional statements bemoaning "the pernicious influence of large campaign contributions"). The Court concluded that there "is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Shrink*, 528 U.S. at 395; *see NRWC*, 459 U.S. at 210 (court has no basis to "second guess" congressional judgments "where corruption is the evil feared").

Just so here. Following *Shrink*, it is simply too late in the day to claim that fears of actual and perceived corruption from excessive contributions are unfounded. *Shrink*, 528 U.S. 391 & n.5 (collecting cases noting link between contributions and corruption).

Plaintiffs' further contention that the Constitution requires exhaustive and Vermont-centered instances of corruption linked directly to specific contribution levels, *see* VRSC Br. at 10-12, is belied by this Court's precedents. *Buckley*, *Shrink* and *McConnell* did not demand proof that there had been corruption or the fear of corruption "just above" the specific levels of the contribution limits being reviewed. *Buckley* rejected the very argument echoed by Plaintiffs here that only much higher contributions would tempt politicians to risk their careers. 424 U.S. at 30; VRSC Br. at 11-12. In its place, the Court accepted

evidence that, as a general matter, large contributions had either corrupted the political process or created a public impression of such corruption. Since contribution limits directly address those concerns, they were rightly found to further significant governmental interests.

More importantly, Plaintiffs' approach would require states to suffer injury before taking steps to protect their political processes and would impose an impossible evidentiary burden. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). Under Plaintiffs' misguided view, in the absence of actual proof of corruption at a specific level of contribution, a state could not act prophylactically to guard against campaign abuses. That is not the law. It is "*the potential for* such influence that demands regulation." *NRWC*, 459 U.S. at 210 (emphasis added); *Shrink*, 528 U.S. at 393-94 nn.5-6. Moreover, a contrary rule would subject states to "endless court battles over sufficiency of the evidence" of corruption. *Munro*, 479 U.S. at 195 (quotation omitted).[23]

2. While Vermont might have justifiably passed Act 64 solely as a preventative measure,[24] unfortunately, it did not. The legislative history of Act 64 and the record before the district court provide significant examples of corruption and the appearance of corruption stemming from contributions in Vermont -- all of which arose despite Vermont's prior, $2,000, contribution limits.[25] Such evidence more than meets any

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[23] Plaintiffs' mistaken approach would also force the State to justify the particular amounts of its contribution limits under both prongs of the *Buckley/Shrink* framework. Instead, contribution levels are rightly examined in the tailoring portion of that analysis.

[24] Act 64 was designed, in part, to safeguard Vermont from the types of scandals that had occurred elsewhere. Exs. I:197, 272, 291-92, 349-50, 364; II:483-84.

[25] With the household median income in Vermont at $32,358 in 1996, this amounted to more than two-thirds of a household's monthly gross income. Ex. V:1740-41.

requirement that the State adduce Vermont-specific evidence of corruption or its appearance. Contrary to Plaintiffs' arguments, Randall Br. at 42, VRSC Br. at 12-13, in terms of both quality and quantity, the evidence in this case far surpasses that relied upon in *Shrink* to uphold Missouri's contribution limits. 528 U.S. at 393-94.

The Findings and the exhaustive evidence presented to the Legislature provide strong proof of corruption and the appearance of corruption in Vermont politics. The Legislature found that some candidates and officials "respond and give access to contributors who make large contributions in preference to those who make small or no contributions;" that large contributions "reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens;" and that reducing large contributions is necessary to fulfill the guarantee of the Vermont Constitution that "all elections ought to be free and without corruption." J.A. 20-22 (Findings (a)(2), (a)(9) & (b)). These Findings were fully supported by the legislative record. *See supra* Statement of the Case, Section I.B; P.A. 52a.

The documentary and testimonial evidence credited at trial by the district court confirmed the Legislature's concerns. After interrogating many witnesses on its own and closely examining the evidence, the court found that "[t]here is reason to believe that large campaign contributions have, at times, had an improper influence" and that large contributions have negatively impacted the public's confidence in the system. P.A. 37a-38a.

The record before the court revealed a political system where donors receive, or were perceived to receive, unequal access to and undue influence over the legislative process and officials solely as a result of their campaign contributions. Sen. Rivers admitted that she gave special consideration to a tax exemption request because the person asking was a large donor.

Tr. VII:2-74. Other officials were equally frank. *See* Tr. IX:167 (Ready: "Not everybody in my district do I have lunch with or...return a call from the floor of the senate before a vote.... [or] meet with on a Saturday morning.... [or] spend half of my son's soccer game talking to about their business. There is definitely different levels of access to elected officials."); Tr. VII:72 (Rivers: "[W]hen I get a call from a large campaign contributor, that will be a call that I return quicker than just another constituent."); Ex. V:1845 (Fiorillo: the larger the contribution, the more likely the official will spend time with the donor).

Indeed, access and influence are the prices customarily paid in return for contributions. Tr. VII:72-74 ("typical" for Vermont officials to give special consideration to requests and views of large contributors). As former Secretary of State Don Hooper explained, donors "expect access and consideration.... So in essence at a minimum [a contribution] buys access. On the worst days I suppose it buys influence." Tr. V:58-59; *see* Tr. IX:195-96 (Governor granted meeting to large, corporate contributor while repeatedly denying meeting on same subject to a group of Vermont farmers).

Donors appreciate and wield this financial clout. State Treasurer Paul Ruse was forced to forgo a re-election bid amidst public outcry over his acceptance of significant contributions from financial firms that "may want favors in return." Ex. III:803-04; *see* Ex. III:795-97. Rep. Kitzmiller stated that Ruse's conduct "certainly gave the impression that there was *quid pro quo* of money given to a candidate and business done by the officeholder for the person giving the money." Tr. X:161-62; *see* Trs. IX:92-93, 103-04; Exs. III:785-87; V:1765; *see also* Tr. X:184-85 (contribution while bill pending believed to be connected to vote).

Officials often take full advantage of this culture as well, creating what is all too often a pay-to-play system:

> Q: [D]o the lobbyists have any understanding of the value of attending a fundraiser for a candidate?
>
> A: It's almost mandatory in some -- I am trying to think of what the right thing is. For example, when Speaker Wright started the speaker's soiree, you had needed -- I think if you were a lobbyist during that period in the legislature and you wanted your bill or your hopes that some other bill would be devastated, if you were serious about that, you needed to attend.

Tr. V:30-31; *see* Ex. II:511 (officials aggressively seek monies from lobbyists).

As the district court correctly observed, the citizens' perception of such a regime is unmistakable: it raises an obvious appearance of corruption that impacts public confidence in the integrity of government. P.A. 36a-38a; *see* Trs. IV.183-84; IX:94-95, 108-09, 116-17, 168-69. Incidents like those above, "increase the cynicism on the part of the public...and make it more difficult to convince people that the democracy is alive and well in this country." Tr. VII:65; *see* Tr. V:54 (perceptions of Ruse incident). Even many of Plaintiffs' witnesses agreed. P.A. 36a-37a.[26]

Expert testimony adduced at trial provided additional confirmation of the impact contributions have upon the conduct of officials. The studies and testimony of Professor Thomas Stratmann showed that "large contributions create the appearance of corruption to the public and affect legislators' voting behavior." P.A. 38a; Tr. VII:198; Ex. III:1064. Dr. John Lott, a VRSC expert, admitted that donors will often do what it

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[26] Indeed, in 1998, nearly three quarters of Vermonters polled believed that wealthy individuals and large corporations had too much influence in politics and ordinary voters did not have enough. Ex. III:847-48; *see Shrink*, 528 U.S. at 394 (relying on survey).

takes to obtain preferential government treatment. The "more favors government has to give out, the more resources that people will spend to obtain those favors." P.A. 38a; Tr. III:154-55 202; Ex. VI:2266.

As the Second Circuit rightly concluded, the evidence before the Vermont Legislature and the district court was more than sufficient to justify the need for Act 64's contribution limitations. P.A. 125a.

B. Vermont's Contribution Limits Are Closely Drawn

The great weight of the evidence convincingly establishes that Act 64's contribution limits are appropriately geared to the Vermont political landscape. Citing primarily evidence considered and rejected at trial, Plaintiffs ask this Court to overturn the findings of the Vermont Legislature, and the conclusions of the district court and of the unanimous court of appeals, all of which determined that Act 64's contribution limits were set at levels permissible under the First Amendment. Those judgments should be affirmed.

This Court has made plain that legislative determinations as to the precise dollar amounts for contribution levels are entitled to "significant" deference and should not be "'fine tun[ed]'" by courts. *Shrink*, 528 U.S. at 388, 397 (quoting *Buckley*, 424 U.S. at 30); *see McConnell*, 540 U.S. at 137 (less rigorous review takes account of legislative expertise in political campaigns). A "court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." 424 U.S. at 30 (internal quotation omitted).[27] And *Shrink* made

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[27] Plaintiffs' argument that no deference should be due to Act 64's contribution limits because they were enacted for the "impermissible purpose" of reducing spending is unsupportable. While the VRSC Plaintiffs cite legislative statements concerning an unenacted version of H.28, which indicate that one intent of that bill was to reduce campaign spending, they fail to note that the bill contained public financing provisions with express spending caps. Ex. I:1, 9. Nor can the statements of one or two legislators concerning a bill that was

clear that the $1,000 limitation upheld in *Buckley* was not "a constitutional minimum below which legislatures could not regulate." 528 U.S. at 397. Appropriate limits will vary based upon the jurisdiction involved.

Following that analysis, this Court has held that contribution limits should be deemed valid unless they are set so low that they prevent candidates from amassing "the resources necessary for effective advocacy" and are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.* (citing *Buckley*, 424 U.S. at 21). The limits of Act 64 are not so draconian.

Based upon considerable evidence, the Legislature and both lower courts determined that the limits of $200, $300, and $400 were directed at donations considered "suspiciously large" by most Vermonters. P.A. 59a; J.A. 20 (Finding (a)(3)); Ex. II:664-80 (1995 poll indicated nearly 70% of Vermonters believed a $100 contribution limit would make politicians more responsive to the public). Such evidence came from witnesses offered by both sides. P.A. 59a; *see also* Trs. IX:225-26; VIII:23 (anything over $100 in Vermont is a significant contribution). As one official stated: "$250 to a working Vermonter is a lot of money. You know, it's the car payment. It's the grocery bill for two weeks ... or three weeks." Tr. IX:117.

Correspondingly, small donations are meaningful in Vermont because nearly every contribution is considered to be a "strong act[ ] of political support." P.A. 42a. In fact, the Republican candidate for Governor in 1996 and 1998 personally sent thank you notes to all donors who gave $5 or more. *Id.* Against such a backdrop, the limits of Act 64 are

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amended extensively establish an impermissible legislative purpose or invalidate an otherwise constitutional law. *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968).

certainly a far cry from being "pointless," *Shrink* 528 U.S. at 397, or "laughably low," P.A. 344a.

Historical giving patterns in Vermont persuasively establish that Act 64 is directed solely at significant contributions and will impact only a modest portion of contributions and candidates. Professor Gierzynski's analysis of the 1994, 1996 and 1998 election cycles confirmed that the limitations of Act 64 would have affected fewer than 10% of the overall contributions received in those elections. P.A. 40a; J.A. 65. Specifically, the limits would have affected only 3.5%, 5.4% and 11.9% of the House contributions, only 6%, 4.7% and 17.2% of the Senate contributions,[28] and only 9.5%, 9.9% and 7.8% of the contributions for statewide elections during those years. J.A. 65.

Plaintiffs' attempt to discount this minimal impact by focusing on those few candidates who have relied greatly upon large contributions is unavailing. *Buckley* and *Shrink* do not and cannot stand for the proposition that contribution limits must be geared to the candidates who have chosen to rely upon a few well-heeled contributors. Indeed, one purpose of contribution limits is to diminish the corruption and appearance

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[28] The great majority (73.6% and greater) of legislative candidates would have had to make no changes to their fundraising as they received no contributions in excess of Act 64's caps. J.A. 65, 76. Likewise, the percent of revenue lost as a result of Act 64 in those three cycles would have been only 6.5%, 5.3% and 3.2% for House candidates and 18.2%, 10.8%, and 10.1% for Senate candidates. J.A. 72, 74. While the percentage of revenue lost was greater for some statewide candidates, such high percentages often corresponded to only small amounts of money. Tr. VI:21, 26; *see* J.A. 67 (Milne); J.A. 69 (Milne; Amestoy); J.A. 71 (Flanagan). Moreover, in a number of cases, candidates did not even spend the full amount of the monies they had raised. J.A. 69 & 85 (Dean); J.A. 71 & 86 (Dean; Snelling). In any event, evidence showed that lost revenues could be replaced through alternative campaign methods. P.A. 59a; Trs. V:85-86; VII:101; *see* 424 U.S. at 22.

of corruption that such reliance fosters. *Shrink*, 528 U.S. at 390. Contribution limits appropriately are to be assessed on their impact across the broad spectrum of candidates. *Daggett*, 205 F.3d at 460.

For similar reasons, Plaintiffs take nothing from their reliance on the flawed report of expert Clark Benson. Benson studied only a single election year, 1998, which happened to show increases over the 1994 and 1996 cycles. Professor Gierzynski testified that drawing conclusions from only one year can be misleading, Tr. VI:73, and Benson agreed that he would have preferred to study additional years, Tr. III:90. Benson's data also excluded candidates who spent less than $500. Ex. III:1020-24. This resulted in his failure to take account of 136 House candidates and 25 Senate candidates, thereby exaggerating the impact of Act 64's limits. *Id.* In light of such deficiencies, the district court implicitly rejected the credibility of Benson and his report in favor of the opinions of Professor Gierzynski. P.A. 39a-40a.

Most importantly, as the district court and the Second Circuit correctly ruled, Act 64's contribution limits will permit candidates to amass sufficient resources to mount effective campaigns. Although some -- but not all -- of Plaintiffs' witnesses offered countervailing testimony, the district court weighed all the proof offered and determined that "the more credible evidence" shows that effective campaigns can be run under Act 64's limits.[29] P.A. 40a. While Plaintiffs continue to cite the contrary evidence they submitted below, the district court's credibility determinations are entitled to deference even in cases concerning the First Amendment. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

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[29] Nearly all witnesses agreed that an effective campaign does not need to be a winning campaign. P.A. 40a n.19; Trs. I:95; II:22; Randall Br. 8-9 (conceding same).

The district court's conclusion was well grounded upon testimony from present and former elected officials, candidates and campaign managers. They provided compelling proof that Act 64's limits would permit effective campaigns at the House, Senate and statewide levels. P.A. 41 n.20; *see* Trs. I:57 (Snelling); IV:187-88 (Howard); V:22, 86 (Hooper); V:141 (Friedman); VII:15-18 (Young); VIII:53-54 (Smith); IX:45-57, 61-62 (Bristol); IX:136 (Ready); X:180-82, 185-186 (Kitzmiller); Exs. IV:1384-85 (Brownell); V:1824 (Fiorillo).[30]

The 1999 race for Mayor of Burlington, Vermont's most populous city, is a telling case in point. In that campaign, Kurt Wright challenged Peter Clavelle. Working under a $200 contribution limit, both candidates "were able to amass sufficient resources to run effective campaigns." P.A. 41a. Clavelle raised almost $39,000, which is more than he had raised in three of four campaigns prior to Act 64. Wright met his fundraising goal of $19,000 and by his own admission ran a competitive campaign, was able to get his message out to a substantial portion of the electorate, and received 40% of the vote. Ex. VIII:2758-67, 3051, 3053, 3071, 3075-76.

The district court rightly employed those figures to support Act 64's contribution limits for state Senate. Campaigns for Senate in Chittenden County, where Burlington is located, had historically averaged $10,000, with the highest spending campaign from 1994-1998 being $34,177. Exs. III:990; IV:1306. Given the amounts raised by Clavelle and Wright, the higher, $300, contribution cap for Senate, and the greater

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[30] Plaintiffs' contention that Act 64 should be invalidated because its limits apply per cycle rather than per election, also misses the mark. The propriety of contribution caps turns principally on their ability to permit effective campaigns, whether for primary or general elections. Vermont's primary and general elections are held only two months apart, some of the closest in the country. Tr. VI:85-86; VIII:71-72. The district court understood this and held that Act 64's limits permitted fully effective campaigns.

geographic area, the district court reasonably determined that the mayoral fundraising provided strong evidence that Act 64's contribution limit for Senate would permit effective advocacy. P.A. 58a-59a.

The VRSC Plaintiffs mistakenly rely on the contention that Wright might have raised more money in the absence of Act 64's limits. VRSC Br. at 18. Even if factually true, such evidence simply provides no basis to invalidate the law. *Shrink*, 528 U.S. at 396; *id.* at 404 (Breyer & Ginsburg, JJ., concurring) (campaign finance laws will always have an adverse impact on some candidates).[31] The evidence shows Wright's campaign was competitive and effective. No more is required.

Given the differing populations and scales, Vermont's caps also compare favorably with the per-election limitations of a number of states, including those from Missouri, which were upheld following remand in *Shrink*. *Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838, 842-43 (8th Cir. 2000)($525 for Senate or any office where the electoral district population is 100,000 or more; $275 for House or any office where the district population is under 100,000). In fact, when Vermont's statewide contribution limits are examined in relation to the size of the constituency -- and thus the size of the campaign needed to reach those voters -- Act 64's limits are more generous than those upheld for Missouri. J.A. 55 (ratio of .00068 versus .00040); P.A. 57a-58a; *see also Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1093-96 (9th Cir. 2003)($400 for Governor and Lt. Governor, $200 for other statewide office, and $100 for all other offices); *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 458-62 (1st Cir. 2000)($250 for Maine's House and Senate); *Florida Right to Life, Inc. v. Mortham*, No.6:98-770, 2000 WL

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[31] If that were the legal standard, federal candidates who might have raised additional monies from foreign citizens, corporations or labor unions, could use that fact to argue against FECA's prohibition of such contributions. *NRWC*, 459 U.S. at 210.

33733256 (M.D. Fla. Mar. 20, 2000)($500 limit in populous Florida).

Even if Act 64's limits require candidates "to raise funds from a greater number of persons" that does not render the law unconstitutional. 424 U.S. at 21-22. If more small donors are encouraged to give, that can hardly be adverse to First Amendment principles.[32] P.A. 59a; Tr: V:119.

IV. Vermont's Party Contribution Limits Are Constitutional

Plaintiffs' challenge to Act 64's limits on the amounts political parties can contribute to candidates is legally and factually flawed.[33] Consistent with *McConnell* and *Colorado II*, Act 64's party contribution limit is targeted to deter party corruption and its appearance and to avoid evasion of the law's other limits. It also permits parties to engage in energetic and effective political advocacy.

Despite Plaintiffs' contrary assertions, VRSC Br. 26, this Court has explicitly recognized that the money flowing into and out of parties has the potential to corrupt candidates and officials. *Colorado II* emphasized that parties "act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 451-52. Accordingly, the Court upheld FECA's limits on coordinated spending by parties as

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[32] A salutary effect of Act 64's limits may be to increase the number of overall donors, as citizens who had felt left out of the process are reconnected. *See* Trs. V:119, 137; VIII:63, 95; IX:137, 241. For example, Rep. Gordon Bristol testified that his mother made her first contribution in 2000 because the contribution finally mattered. Tr. IX:58-59.

[33] Plaintiffs contend only that Act 64's contribution limits are too low, not that parties should be exempt from contribution limits altogether. VRSC Br. 26; Randall Br. 49-50. The latter position is foreclosed by *Colorado II*, which upheld FECA's limits on coordinated party expenditures. 533 U.S. at 464-65. Nor do they contend that the limits for political committees should be higher than those for individuals.

necessary to prevent individuals and PACs from circumventing the law's individual contribution limits. *Id.* at 464-65. *McConnell,* likewise, found that parties sell access to and influence over candidates and officials in return for contributions. 540 U.S. at 145-53. "[C]ontributions to a federal candidate's party in aid of that candidate's campaign threaten to create – no less than would a direct contribution to the candidate – a sense of obligation." *Id.* at 144.

Vermont faces similar concerns. Vermont's political parties, like the federal, offer preferential and private access to candidates at fundraisers in return for contributions. Tr. IX:112-13. As Sen. Ready testified, donors attending such events "haven't bought the person but they have certainly bought a piece of [their] time." Tr. IX:113. Parties also use their contributions to exert improper influence on candidates. Formerly, Vermont placed no limits on party contributions. Evidence below detailed how parties had used large contributions to "buy a candidate, if you will," and influence the candidate's votes, because candidates who are heavily financed by political parties typically follow the party's views. Tr. IX:70-71. Rep. Gordon Bristol saw candidates who received large amounts of party money and consequently "fe[lt] the need to be obligated to that cause, regardless of necessarily what their district wants." *Id.; see McConnell,* 540 U.S. at 153. He admitted that the party had pressured him to change his positions on some issues. Tr. IX:77. He testified that, based on his six years of experience in the Legislature, contributions from either special interests or political parties can affect the way a legislator votes. Tr. IX:71.

As the district court correctly observed, the "threat of corruption...often filters through the party machines," P.A. 73a-74a, and can affect the legislative agenda. Sen. Ready explained how the beverage industry exerted financial pressure to defeat a bill that expanded bottle deposits, even though the bill had overwhelming popular support. Tr. IX:105-111. Donors from the beverage industry gave large amounts of

money to both parties, Ex. V:1766, and industry lobbyists were present at party fundraisers, Tr. IX:109-10. *See* Tr. VII:66 (financial pressures from party and industry defeated drug pricing bill). Likewise, a party leader told Sen. Rivers that if her food labeling bill died in committee, he could take credit and the party might then receive a large contribution from the food industry. Tr. VII:70-71. The bill was defeated in committee. *Id.; see* Exs. I:304 (quarry interest donated $10,000 to the Vermont Republican Party six months before a key legislative vote); V:1758-59 (pharmaceutical companies sponsored party golf tournament when drug bill pending); Tr. V:30-31 (lobbyist attendance at party fundraisers necessary to obtain passage of bills).

Given the money flowing into political parties, contribution limits are further necessary to avoid evasion of Act 64's individual limits. Tr. VIII:191-92. The district court expressly found that Vermonters view political parties as "heavily influenced, if not controlled, by a few large donors." P.A. 37a. The record shows that, in 1998, the Democratic Party received 66% of its revenues from 43 contributors, while the VRSC received 46% of revenues from 39 donors. *Id.*; Exs. III:1018; VII:2403, 2408-09. Under Act 64, donors are permitted to give up to $2000 per election cycle to a political party -- between 5 and 10 times the amount a donor may give to individual candidates. 17 V.S.A. §2805(a)(P.A. 5a). Absent party contribution limits, a group of donors with similar interests (such as industry executives) could effectively "pool" contributions to a political party. The political party could, in turn, use that money to fund a significant portion of the candidate's campaign, thereby evading Act 64's individual contribution limit.[34] Trs. IX-215, 220; X-171-72; Exs. II:455,

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[34] Act 64's anti-pass-through provision, 17 V.S.A. §2805(e), is insufficient to prevent such pooling and is "likely to catch only the most blatant behavior." P.A. 71a. *Cf. McConnell,* 540 U.S. at 143 (anti-bribery laws alone will not eliminate corruption).

632-37. In fact, one of the named Plaintiffs in this case revealed that he had shifted his donations to his party because of Act 64's limit on candidate contributions. Tr. II:174. The district court accurately observed that "[i]t is reasonable to assume that larger special interest donors would do the same." P.A. 71a n.26. The limits on contributions by parties to candidates close this loophole.

Plaintiffs' argument that Act 64's party limits are too low does not withstand scrutiny. To begin with, the Court in *Colorado II* declined to afford "unique" First Amendment status to parties and rejected arguments for treating parties "differently from other political actors subject to limitation on political spending." 533 U.S. at 455. Party contribution limits are not subject to full exacting scrutiny, *see id.* at 453, 456, and the Court has no "scalpel to probe" the precise level chosen by the Legislature, *Buckley,* 424 U.S. at 30. Since Act 64's limits on party contributions mirror those for groups and individuals, the arguments supporting those limits apply with equal force to parties. *See Colorado II,* 533 U.S. at 451-52. In short, the contributions permitted under the law are meaningful acts of association in Vermont, and candidates will still be able to run effective campaigns under the limits. P.A. 39a-42a, 58a-59a; *see supra* Section III.B.

The Plaintiffs' "sky is falling" rhetoric notwithstanding, these contribution limits do not frustrate the associational rights of the political parties or undermine their ability to engage in effective advocacy. Indeed, parties are in a favored position with respect to contributions, because a state party, a national committee, and a party's legislative PACs can each make contributions to a candidate.[35] Moreover, Act 64 places

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[35] Plaintiffs' criticism of Act 64's treatment of state and local committees of a party as a single source is unjustified. The trial evidence showed that this accurately reflects the reality of how parties are run in Vermont, P.A. 77a, and Act 64 does not force a state party to centralize power at the expense of local committees, Tr. IX:10-11.

absolutely no limit on the amounts parties may independently spend to advocate for the election or defeat of candidates or to engage in other party activities, such as get-out-the-vote efforts, registration drives, platform promotion, and absentee ballot facilitation.[36] Trs. I:39, 167-69; II:121-22; IV:60-61, 103; V:35-36, IX:138; X:121-27, 174 (all describing party activities unaffected by Act 64).

Act 64's party limits, thus, serve vital governmental interests while providing for meaningful association, permitting effective campaigns and retaining the parties' important place in elective politics. As such, they are fully constitutional.

V. The Rebuttable Presumption Of Section 2809(d) Is Constitutional

Plaintiffs mistakenly contend that the rebuttable presumption of coordination for expenditures by political parties[37] that primarily benefit six or fewer candidates is unconstitutional. 17 V.S.A. §2809(d)(P.A. 8a). The argument is based on a faulty view of Vermont law and wildly overstates the effect of the presumption of coordination. Rightly viewed, Section 2809(d) imposes little, if any, burden upon parties and does not chill speech.[38]

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[36] Although Plaintiffs contend that parties will no longer be able to contribute donor or voter lists to candidates, evidence showed that parties are chary of sharing donor lists. Trs. I:90-91; V:46-47. As to party-created voter lists, which often contain many inaccuracies, Tr. VII:84-85, the record does not establish that the value of renting or buying such lists would exceed the limits of Act 64. Trs. I:167-68.

[37] The same presumption applies to expenditures by political committees that recruit or endorse candidates.

[38] Plaintiffs do not challenge Act 64's coordination provisions generally, nor could they. Coordinated expenditures may be treated as contributions. *Colorado II*, 533 U.S. at 465; *McConnell*, 540 U.S. at 219; 424 U.S. at 46-47. And, contrary to the dissent below, P.A. 231a, so long as they act independently, Act 64 places no limit upon what supporters can spend or do to champion their candidate.

Section 2809(d) imposes merely an evidentiary presumption on those expenditures most likely to have been furtively controlled by one or more candidates. P.A. 86a & n.28. Under Vermont law, such a presumption allocates the burden of production on an issue -- without changing the burden of persuasion. Vt. R. Evid. 301(a); *State v. Pluta,* 600 A.2d 291, 293 (Vt. 1991). The presumption has no effect at all unless the State or a candidate chooses to litigate whether a particular expenditure was coordinated. 17 V.S.A. §2809(d-e).

If litigation ensues -- as it could for any expenditure, whether covered by the presumption or not -- the rebuttable presumption plays a minor role. It "contributes no evidence" and "disappears when facts appear." *Rocque v. Cooperative Fire Ins. Ass'n,* 438 A.2d 383, 386 (Vt. 1981). In a case covered by the presumption, a political party need only present some evidence "that the presumed fact [is] not true" and the presumption vanishes. *Pluta,* 600 A.2d at 293; *see Rocque,* 438 A.2d at 386. This "bursting bubble" type of presumption has no effect on the burden of persuasion, which remains at all times with the complaining party. Vt. R. Evid. 301(a); *see State v. Giard,* 871 A.2d 976, 979 (Vt. 2005); Ex. II:742 (Secretary of State Regulation 2000-01, interpreting Section 2809).

Once the effect of the rebuttable presumption is properly understood, plaintiffs' arguments against it wither away. Parties and candidates need not "challenge" the presumption, nor must they affirmatively "disassociate" themselves from expenditures. Randall Br. 38-39. The statute does not shift the burden of proof or persuasion, VRSC Br. 45, or create a presumption that any party or candidate has violated the law, Randall Br. 39. All the presumption does -- and again, it comes into play only if the matter is brought to court -- is require the party making the expenditure to come forward with some evidence that the expenditure was not coordinated with the candidate. Simple testimony that the expenditure was not coordinated would suffice to defeat the presumption. P.A. 184a; *cf. Giard,* 871 A.2d at 978 (statutory presumption of

blood alcohol level rebutted by defendant's testimony concerning his alcohol consumption); *Rocque*, 438 A.2d at 386 (presumption of receipt of notice from proper mailing rebutted by testimony that notice was not received). Indeed, the presumption merely puts the duty of going forward with evidence on the person with knowledge of the actual facts -- here, the party making the expenditures. *See* Vt. R. Evid. 301, reporter's note. Placing such an obligation on the party that is in full possession of the relevant facts makes perfect sense.

This "modest" evidentiary requirement, *Giard*, 871 A.2d at 978, imposes a minimal burden at best and does not violate the First Amendment. Vermont's rebuttable presumption is thus entirely unlike the conclusive presumption of coordination struck down in *Colorado I*, 518 U.S. at 619. Nor is it like the presumption in *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988), the principal case relied on by Plaintiffs. In *Riley*, a state statute presumed that certain fees charged by charitable fundraisers were unreasonable. *Id.* at 785-86. A fundraiser could only rebut the presumption by proving the fees were "necessary" as defined in the statute. And, even if the presumption were successfully rebutted, the factfinder could still find the fee unreasonable based on other factors. *Id.* at 786, 794. Consequently, fundraisers bore a significant initial burden and were exposed to a substantial degree of uncertainty about what fees would be found reasonable under the statute. *Id.*

Parties affected by Section 2809(d)'s presumption are nothing like the fundraisers in *Riley*. They bear no burden of proof but only a minimal burden of producing evidence on facts within their knowledge, and the test for distinguishing between independent and coordinated expenditures is clearly established by the statute, the rule and precedent. P.A. 182a-84a. As a result, parties can and should be able to understand whether their own expenditure has been coordinated with a candidate and should suffer no chilling effect on their speech.

CONCLUSION

The State respectfully requests that the Court: (a) affirm the decision below and uphold the constitutionality of Act 64's limits on the amounts that can be contributed to candidates, the presumption of 17 V.S.A. §2809(d), and the conclusion that the law's expenditure limits are supported by compelling interests; and (b) reverse the decision below and find that Act 64's spending limits are narrowly tailored and constitutional. In the alternative, if additional factual development is necessary regarding narrow tailoring, the Court should affirm the decision below and remand that issue to the district court.

Respectfully submitted,

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